CHIA YONG KHING v. CHUNG YOKE SIAW & ANOR.

[F.C. (Suffian C.J.), Ali F.J. and Mohamad Azmi J.)
January 21, 1974]
[Johor Bahru — Federal Court Civil Appeal No. 24 of 1973]

Landlord and Tenant — Claim for possession on ground that rent is in arrears — Refusal of landlord to accept rent — No right to terminate tenancy — Control of Rent Act, 1966, s. 16(1) and (3).

In this case the respondent had obtained an order for possession of certain premises against the appellant on the ground that the appellant had been in arrears of rent. The appellant appealed to the High Court but his appeal was dismissed. On appeal to the Federal Court it appeared that the rents were in arrears not because the appellant had defaulted to pay but because the respondent had refused to accept the rents.

Held: on the facts the appellant was never in arrears of the rent and therefore the respondent had no right to terminate the tenancy when the notice to quit was given. The appeal must therefore be allowed and the order for possession set aside.

Cases referred to:-

(1) *M. M. Ally & Co.* v. *Chellamah* [1948] M.L.J. 202.
(2) *Ong Keng Huat* v. *Shaw & Shaw Ltd.* [1957] M.L.J. 46.
(3) *Juliana Netto* v. *S. Saravanamuthu* [1959] M.L.J. 234.
(4) *Payne* v. *Cooper* [1957] 3 All E.R. 335.

FEDERAL COURT.

M. S. Miranda for the appellant.

S. G. Thakurta for the respondent.

Ali F.J.: This is an appeal against an order of possession made by the President, Sessions Court at Batu Pahat in respect of the front portion of premises No. 16, Jalan Soga, Batu Pahat. It was common ground that the premises is controlled premises subject to the operation of the provision of the Control of Rent Act, 1966. The order was made under section 16(1)(a) of the Act on the ground that the appellant, the sub-tenant, was in arrears of rents for five months, namely, April, May, June, July and August, 1969. The monthly rent was $140. The appellant has appealed against the order to the High Court at Muar, Johor but his appeal was dismissed. He has now appealed to this court.

The main issue in this case is whether the said rents were in arrears for fourteen days or upwards when the tenancy was terminated by notice to quit. The notice was contained in a letter dated 1st August, 1969 from the respondent's solicitors requiring the appellant to quit the premises in question on or before 30th September, 1969. The said letter also contained a demand for $700 being rents for the five months and a threat of legal proceedings in the event of a failure to comply. The appellant complied by sending a cheque for the amount demanded. But this was returned under cover of a letter dated 22nd August from the respondent's solicitors who stated that they have been instructed to reject payment. In November the respondent issued the summons in this case.

In her statement of claim the plaintiff referred to a tenancy agreement between her and the appellant whereby she let the said premises for one year from 1st April, 1968 to 31st March, 1969. In paragraph 5 she alleged that the appellant has refused and neglected to pay rents for the months of April, May, June, July and August, 1969 amounting to $700 in spite of repeated demands made by her oraliy. Thereupon she prayed for an order of possession under section 16(1)(a) of the Act. The appellant in his defence admitted the tenancy agreement but claimed the protection of the Act as a statutory tenant. It is not in doubt that he is a statutory tenant. As against the allegation that he refused and neglected to pay the five months' rents in spite of repeated demands made orally his defence was a denial. In paragraph 2 of the defence statement he said he has regularly tendered rents for those months but the respondent refused to accept the same. If this was true then by reason of the proviso to section 16(1)(a) the rents were not in arrears. In his submission at the trial counsel for the respondent has said that "the main issue is whether defendant has tendered rents. If he did he has a good defence."

Both parties gave oral evidence at the trial. The respondent in cross-examination admitted that rent for April was tendered. After April, she said, the appellant did not offer to pay rent. She also admitted she did not ask for rents adding "Even if he offered to pay rents for those three months" (June, July and August) "I did not want to accept." Quite clearly her allegation in paragraph 5 of her statement of claim was substantially untrue. There was no truth in the allegation that the appellant has refused and neglected to pay rent for April. Nor was there any truth in the averment that she has made repeated demands for rents orally. She also said in evidence that she did not want to accept rents because she wanted the premises back. This was a clear admission that in refusing to accept rent for April she wanted to make it appear that the appellant was in arrears of rents and thereby furnished her with a ground for recovering possession under section 16(1)(a). In the Court of Appeal case of *M. M. Ally & Co.* v. *Chellamah* (f)[1] Briggs J. speaking of such conduct of the landlord said on page 205:

"The court is not constrained to countenance so discreditable a proceeding. A man cannot, by his own deliberate default, create an artificial default in another. If a landlord, by one device or another, prevents his tenant from properly paying his rent, he may not cease to be able to recover the monies concerned; but he certainly cannot thereafter come to court and claim an advantage, (the right to ejectment) which, but for his own improper conduct, the law would have refused him."

These words were cited with approval by Rigby J. in another Court of Appeal case of *Ong Keng Huat* v. *Shaw & Shaw Ltd.*[2] Before April, 1969 it was clear that the appellant has never been in arrears of rent. On the evidence at the trial there cannot be any doubt that he was ready and willing to pay his rent but could not do so because of the respondent's conduct in refusing to accept payment. The reasonable conclusion on the evidence must be that rents for five months have not been paid because of the respondent's refusal to accept and not because the appellant has defaulted or has committed a breach of the covenant to pay rent. The refusal to accept rent for April was evidence of a device to prevent the appellant from properly paying his rents. The principle applied by Briggs J. in *M. M. Ally & Co.* v. *Chellamah* (f) must, therefore, apply here. Section 16(1)(a) was designed to give the landlord the right to recover possession because the tenant

has defaulted in the payment of rent for fourteen days and upwards. The right to recover must be a right which is recognised by law. The respondent did not have that right when notice to quit was given. It follows, therefore, that the notice was bad because she has no right to terminate the tenancy. Neither the trial president nor the learned appeal judge has considered this line of approach.

The trial president in his grounds of decision said that the notice to quit was perfectly in order and valid and that on the date of the notice, *i.e.* 1st August, 1969 the appellant was in arrears of five months' rents. For this reason alone he could not see how the appellant could resist the respondent's claim. In taking this view he was apparently thinking that the words in brackets "whether formally demanded or not" in clause 8 of the tenancy agreement imposed no contractual obligation on the respondent to make any demand for rent. Even if that be so I fail to see how it can be relevant to the right of the respondent to recover possession under section 16(1)(a). The notice to quit is a legal method of terminating a tenancy. The right to give notice arises only when there is a right to possession and there is no right to possession if the tenant has not defaulted in the payment of rent.

I will now turn to the judgment of the High Court. The learned appeal judge referring to the conflict of evidence between the parties on the question whether or not rents have been tendered said that the trial president disbelieved the appellant's evidence and so disbelieving has found as a fact that rents have not been tendered. Following established principle he declined to disturb such finding.

I have read the trial president's grounds of decision with care and I am unable to discover any such finding. Nowhere did the trial president say that he disbelieved the appellant. I have already discussed the reason for the trial president's decision and I do not think that I need repeat it. With respect I think the learned appeal judge has misunderstood the judgment of the Sessions Court. In the result I would allow this appeal and set aside the judgment of the High Court and the order of possession made by the trial president. Following *M. M. Ally & Co.* v. *Chellamah* (f) I would order the respondent to pay the costs of the appeal in the High Court and of this appeal and also the costs of the action in the Sessions Court. The amount due by the appellant to the respondent in respect of rents not only before action brought but todate should be set off against the amount of costs when taxed. The deposit of $500 to be refunded to the appellant.

Before leaving this case I wish to say a few words on section 16(3) which reads as follows:

"(3) Where any order or judgment for the recovery of possession of any controlled premises is made or given on the grounds of the non-payment of rent the court may, if it thinks it reasonable so to do, stay or suspend execution on any such order or judgment or postpone the date of possession for such period not exceeding six months from the date of the order or judgment as it thinks fit and subject to such conditions in regard to payment by the tenant of arrears of rent, rent, costs and otherwise as the court thinks fit, and, if such conditions are complied with, the court may, if it thinks fit, discharge or rescind any such order or judgment."

At the trial counsel for the appellant drew the attention of the trial president to this provision apparently asking court to exercise its discretion by discharging or rescinding the order of possession upon the appellant paying rents due. The final order drawn up which was dated 15th May, 1971 contains a direction that vacant possession of the premises be given on or before 1st September, 1971. It also contains a direction for payment of rents up to 1st September, 1971 and payment of double rent after 1st September. Nowhere is it stated that upon such payments being made the order of possession would be discharged or rescinded. The order was not a conditional but an absolute order of possession as referred to by Ong J. in *Juliana Netto* v. *S. Saravanamuthu.*[3] In other words the trial president had not exercised his discretionary power. Indeed I doubt very much if section 16(3) was considered by him. In the High Court the point arose whether or not the trial president has exercised his discretion. The learned appeal judge was of the view that he has. He referred to that part of the judgment of Ong J. in *Juliana Netto* v. *S. Saravanamuthu* which reads as follows:

"Where a claim to possession of premises is made by a landlord under section 12(1)(a) and he is successful, it then lies on the tenant forthwith to ask for such relief as the court may think reasonable to grant to him in the circumstances. The court may then (a) make an absolute order for possession without any qualification, or (b) make such order and suspend its execution for any period not exceeding 6 months from the date of the order, or (c) make a conditional order, for a specimen of which see Form 138 of the County Court Practice 1957 to which reference was made in *Payne* v. *Cooper* [1957] 3 All E.R. 335."

The learned appeal judge seems to think that the trial president has made an order in terms of (b) *i.e.* an order suspending execution and has, therefore, exercised his discretion. The power to stay or suspend execution or postpone date of possession under section 16(3) is to enable the court to give the tenant time to comply with conditions relating to payment of arrears of rent, rent and costs. The word "and subject" in this section are to be read conjunctively and not disjunctively. When a tenant asks for the exercise of discretion under the section he wants to retain possession of the premises and not just to continue in possession for six months. The section must be read as a whole and I feel certain Ong J. did not intend to suggest that it should be otherwise. I need say no more because whether or not the trial president has exercised his discretion will not affect the decision in this appeal.

Suffian C.J. and **Mohamed Azmi J.** concurred.

Solicitors: *M. S. Miranda & Co.; Allen, Gledhill & Ball.*